IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1890

LEE FRISSELL,
Petitioner,

v.

FRANK L. RIZZO,
Mayor of the City of Philadelphia,

and

SHELDON L. ALBERT,
City Solicitor of the City of Philadelphia,

and

CITY OF PHILADELPHIA, PENNSYLVANIA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, Lee Frissell, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Third Circuit rendered in these proceedings on February 20, 1979.

Opinions Below

On June 22, 1978, the United States District Court for the Eastern District of Pennsylvania entered an order dismissing the complaint, without opinion. This order appears at A18.

On February 20, 1979, the United States Court of Appeals for the Third Circuit entered judgment, with opinion, affirming the order of the District Court. This opinion is as yet unreported and appears at A1 through A17.

Jurisdiction

The judgment of the Court of Appeals was entered on February 20, 1979, and rehearing denied on March 23, 1979. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Does a Philadelphia resident, voter, and taxpayer have standing to seek injunctive relief under § 1983 of the Civil Rights Act against official policy denying customary city advertising to newspapers in reprisal for publication of news articles deemed offensive to the mayor—a policy claimed to chill and inhibit freedom of the press and freedom of expression in Philadelphia, to his detriment?

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case

1. Nature of the Case

This action is brought under the Civil Rights Act, Title 42 U.S.C. § 1983. Plaintiff, a Philadelphia resident, voter, and taxpayer, contends that defendants, the mayor and the city solicitor of Philadelphia, have promulgated a policy to deny a newspaper, The Evening Bulletin ("Bulletin"), customary city advertising amounting to about $280,000 annually, in reprisal for the Bulletin's publication of certain articles deemed offensive by the mayor.

Plaintiff claims that defendants' policy is chilling and inhibiting freedom of the press and freedom of expression in Philadelphia to his detriment.

Preliminary and permanent relief is sought enjoining defendants "from denying newspapers customary public advertising as a reprisal for publication of news articles deemed offensive by the Mayor; and from taking other reprisals against the press, in their official capacities (Complaint, A24)."

2. The Complaint[1]

The complaint (A22) alleges that the Bulletin, a newspaper of general circulation published daily in Philadelphia and one of Philadelphia's two most widely circulated newspapers, published certain news articles in June, 1978, that the mayor of Philadelphia deemed offensive. In direct reprisal for the Bulletin's publication of these articles, the mayor promulgated a policy whereby the Bulletin is to be deprived of certain public advertisements customarily run in this newspaper and paid for out of the public funds, in an amount totaling about $280,000 annually. The mayor called a public press conference to announce this policy and its purpose of hurting the Bulletin in its pocketbook. He also said that he would recommend that the sheriff of Philadelphia County carry out a similar policy with respect to public advertising under his control. The city solicitor aided and abetted the mayor in the formulation and promulgation of these policies. The effect of the mayor's and city solicitor's activities is to chill and inhibit freedom of the press and freedom of expression in Philadelphia to the detriment of plaintiff, a resident, voter, and taxpayer, and other citizens.

[1] In the posture in which the complaint was dismissed, the factual allegations of the complaint, together with their fair inferences, must be accepted as true and construed in favor of the pleader. *Conley v. Gibson*, 355 U.S. 41 (1957).

3. Course of the Proceedings

This action was commenced on June 15, 1978. On June 16, 1978, plaintiff moved for a preliminary injunction (A19) to restrain the defendants from denying newspapers customary public advertising in reprisal for publication of articles deemed offensive by the mayor. The court scheduled hearing on the motion for June 22, 1978. At the commencement of the June 22, 1978, hearing on preliminary injunction, the trial judge, *sua sponte*, raised the question as to whether plaintiff had standing to bring his action. After hearing argument from the parties on this issue, the judge ruled from the bench that the complaint was dismissed since plaintiff had no standing to bring the action. The hearing was thus concluded without any evidence being taken although plaintiff was prepared to present his case with various witnesses he had subpoenaed, including reporters that had heard the mayor and the city solicitor announce the policy at issue. On the same day, the judge signed a written order, dismissing the action on the basis that plaintiff had no standing (A18).

Plaintiff appealed to the United States Court of Appeals for the Third Circuit from the order dismissing the complaint on June 27, 1978. The appeal was docketed on June 28, 1978, together with a motion that the appeal be expedited, which motion was subsequently denied. On February 20, 1979, a panel of the Court of Appeals entered judgment affirming the order of the District Court. Appellant's petition for rehearing *in banc* was denied by the court on March 23, 1979.

4. The Decision Below of Which Review Is Sought

In affirming the order of the District Court, the Court of Appeals held:

(a) That plaintiff's allegations that the effect of defendants' activities is to chill and inhibit freedom of the press

and freedom of expression in Philadelphia, to his detriment as a Philadelphia citizen and voter, did not provide him a basis for standing because the consequence of a rule which granted standing to every member of the general public whenever the First Amendment was violated in a manner that remotely tended to chill public debate, would stray "too close to permitting standing to vindicate an abstract interest in the legality of government conduct (Opinion, A8-A9)."

(b) That if plaintiff's complaint was read as alleging injury to a protected relationship with the Bulletin, there was still no basis for standing because the Bulletin, which was the "best plaintiff" to bring the action, had taken no position in the litigation and there was no showing that there was any genuine obstacle barring the Bulletin from bringing suit in its own right (Opinion A12-A15).

(c) That plaintiff's capacity as a municipal taxpayer does not provide a basis for standing, even though he might have standing to bring an action under state law, because standing to sue in a federal trial court is determined by federal law and a municipal taxpayer has standing in federal court "only to challenge expenditures in violation of those constitutional provisions which are recognized as specific limitations upon state power to tax and spend" and that plaintiff "alleged no conduct in violation of a specific constitutional limitation on the spending power (Opinion A15-A17)."

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is at Variance With the Decisions of This Court.

The lower court erred in denying plaintiff standing to bring this action in his capacity as a resident and voter of Philadelphia whose interests in a free market place of ideas in the Philadelphia community, protected under the First Amendment, were directly affected by the challenged official conduct.

A major purpose of the First Amendment[2] to the Constitution of the United States, made applicable to the states by Amendment XIV, Section 1, the "Due Process" clause, was to protect the citizen's right to receive information uninhibited by governmental censorship.

In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969), this Court said:

> " '(S)peech concerning public affairs is more than self-expression; it is the essence of self-government' (citations omitted). It is the *right of the public* to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here (emphasis supplied)."

In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court found unconstitutional a state statute which prohibited corporate free speech in connection with referenda subject to popular vote. The court's decision rested on the right of the public to be informed. This Court observed that the lower court erred in analyzing the case in terms of the extent of First Amendment rights of corporations (435 U.S. at 775-776). Noting (at 776-777) that "there is practically univer-

[2] Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

sal agreement that a major purpose of (the First) Amendment was to protect the free discussion of governmental affairs," this Court said (at 783) that its recent commercial speech cases "illustrate that the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."

The decision in *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), is directly on point and controlling in according standing to plaintiff under the circumstances. In *SCRAP*, this Court upheld standing of plaintiffs[3] to challenge railroad rate increases on the basis of allegations that they were users of forests, rivers, streams, mountains and other natural resources surrounding the Washington metropolitan area and that the rate increases would have an adverse environmental impact on these natural resources, to their detriment, since they would discourage the use of recyclable materials, resulting in more refuse that might be discarded in national parks in the Washington area, and in the need to use more natural resources to provide goods, some of which resources might be taken from the Washington area. In this case, plaintiff has standing to complain of impact upon the informational environment in his community by official action.

In denying the plaintiff's standing, the decision of the Court of Appeals vitiates his claim of injury by saying:

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[3] under the Administrative Procedure Act, 5 U.S.C. § 702, which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Compare 42 U.S.C. § 1983, under which plaintiff seeks redress here.

> "But it does not follow that because the First Amendment protects widespread public debate, every member of the general public suffers injury whenever the First Amendment is violated in a manner that remotely tends to chill that debate (A8)."

But plaintiff specifically alleges that the challenged official conduct will chill and inhibit freedom of the press and freedom of expression in Philadelphia to his detriment, and in reviewing a dismissal on the pleadings, all of the material allegations of the complaint must be accepted as true and construed in favor of the complaining party. *Conley v. Gibson*, 355 U.S. 41 (1957). In *SCRAP*, which involved a far more attenuated line of causation to the eventual injury of which the plaintiffs complained than in this case, this Court rejected denial of standing in the light of allegations of a causal connection between the complained of conduct and the harm to plaintiffs (412 U.S. at 689-691).

There is nothing tenuous about plaintiff's claim of injury from the challenged official policy, which employs substantial public advertising funds in a manner specifically designed to intimidate the city's press. Newspapers and other media from whom advertising is being withheld, including the Bulletin, will be moved to curry the favor of the mayor in order to obtain advertising in the future. Newspapers and other media that enjoy advertising will wish to curry favor in order to continue to enjoy advertising and will wish to avoid incurring disfavor in order to avoid the sanction of withheld advertising.[4] Plaintiff, who relies on the stock of information available to the public from a free and vigorous press, is being caused damage by this chilled environment. Contrary to the Court of Appeals analysis, petitioner does not here seek "to vindicate an abstract interest in the legality of government

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[4] The advertising must be published in some city newspaper.

conduct," but seeks to protect his rights to a free and vigorous press directly accorded to him under the First Amendment to the United States Constitution.

In *Gladstone, Realtors v. Village of Bellwood*, ... U.S. ...., 47 U.S.L.W. 4377 (decided April 17, 1979) this Court upheld standing of residents of a community to complain of racial steering of real estate purchasers in their community, on the basis that the resulting transformation of their neighborhood from an integrated to a predominantly Negro community was depriving them of "the social and professional benefits of living in an integrated society." Here, plaintiff has standing to complain both of the detriment to him in being deprived of access to a free and vigorous press and the further detriment of being deprived of the social, professional, political, and other benefits of living in an informed community whose other members had access to a free and vigorous press.

II. The Question Involved Is of Exceptional Importance.

It is fundamental that free speech concerning public affairs is the essence of self-government and meaningful democracy. *Red Lion Broadcasting Co. v. FCC, supra; Mills v. Alabama*, 384 U.S. 214 (1966). In *Mills*, this Court said (at 218-219):

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

The decision below, which precludes citizens from seeking redress from official policy designed to control the community's press, seriously undermines the constitutional plan of protection of free discussion of governmental affairs necessary to proper self-government and meaningful democracy. The decision below merits the most careful scrutiny of this Court.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for certiorari should be granted to review the opinion and judgment of the Court of Appeals.

Respectfully submitted,

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APPENDIX.

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1863

LEE FRISSELL,

Appellant

v.

FRANK L. RIZZO,
Mayor of the City of Philadelphia
and
SHELDON L. ALBERT,
City Solicitor of the City of Philadelphia
and
CITY OF PHILADELPHIA, PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

D.C. Civil No. 78-2019

Argued December 12, 1978

Before: GIBBONS, VAN DUSEN and ROSENN, *Circuit Judges*

(Opinion filed February 20, 1979)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*

In this civil rights action we consider when, if ever, a citizen and taxpayer is entitled to bring suit to redress a First Amendment injury to his relationship with a newspaper. The district court dismissed the complaint for want of standing. We conclude that, while in some instances of First Amendment injury recognition of a newspaper reader's standing might be proper, this case is not one of them. We therefore affirm.

I. FACTS AND PROCEEDINGS BELOW

This lawsuit arises out of a dispute between Mayor Frank Rizzo of Philadelphia and the Philadelphia Evening Bulletin, a major newspaper in that community. On June 11, 1978, the Bulletin published a report that the City of Philadelphia had begun negotiations with American Family Life Assurance Company, an out-of-state insurance firm, concerning a program of optional cancer insurance for City employees. The local representative of American Family, Alfred E. Smith O'Neill, was a leader in the then current drive to revise the Philadelphia City Charter to permit Mayor Rizzo to seek a third term of office.

Mayor Rizzo was apparently upset by the Bulletin's report. He called the managing editor of the paper and denounced as false its account of the negotiations. The Bulletin stood by its story. On Tuesday, June 13, 1978,

the Mayor announced to the press that he had instructed City officials to withdraw all of the City's legal advertising from the Bulletin "forever—or as long as I'm Mayor." He made it plain that the withdrawal of advertising was a response to the Bulletin's story, and was punitive in nature. As he put it: "You have to hit them in the pocketbook, where it hurts." The gross value of the advertising withdrawn is alleged to be $280,000 per annum.

On June 15, appellant Frissell brought this action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, naming as defendants the Mayor, the City Solicitor, and the City itself. The complaint alleged that appellant was a resident, taxpayer, and registered voter of Philadelphia. It claimed that the effect of the withdrawal of advertising from the Bulletin was "to chill and inhibit freedom of the press and freedom of expression in the City, to the detriment of plaintiff and other citizens." The relief sought included preliminary and permanent injunctions barring the defendants "from denying newspapers customary public advertising as a reprisal for publication of news articles deemed offensive by the Mayor."

At the hearing on the motion for a preliminary injunction, the district judge, *sua sponte,* raised the issue of plaintiff's standing to bring the action. After hearing argument, the judge dismissed the complaint for lack of standing. This appeal followed.

II. THE LEGAL ISSUE

Broadly put, the question raised by a dismissal for want of standing is "whether the litigant is entitled to have the court decide the merits" of the legal controversy before it. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). This inquiry normally turns not upon "the fitness for adjudication . . . of the legal questions" at issue, but rather on "the nature and sufficiency of the litigant's concern with the subject matter of the litigation."[1] The Supreme Court

1. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, The Federal Courts and the Federal System 156 (2d ed. 1973).

has recently followed a two stage analysis of standing. First, it has required that the claimant demonstrate that he, himself, has been exposed to some actual or threatened injury. *E.g., Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973). This requirement is related to the constitutional limitation of the judicial power to "cases and controversies," and reflects the traditional notion that "Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party." *Warth v. Seldin, supra,* 422 U.S. at 499. The legislative and coercive powers of an Art. III court are therefore properly invoked only in aid of that remedial function, not as an independent justification for the exercise of jurisdiction.

Once the court finds Art. III, or "pure" standing, it must then determine whether the claim is barred by nonconstitutional, prudential limitations on the exercise of its jurisdiction. *Duke Power Co. v. Carolina Environmental Study Group,* 46 U.S.L.W. 4845, 4848-50 (U.S. June 26, 1978); *Singleton v. Wulff,* 428 U.S. 106, 112 (1976); *Warth v. Seldin, supra,* 422 U.S. at 498. Where the harm asserted is "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens" that fact counsels against the exercise of jurisdiction. *E.g., Warth v. Seldin, supra,* 422 U.S. at 499; *Schlesinger v. Reservists to Stop the War,* 418 U.S. 208, 220 (1974); *United States v. Richardson,* 418 U.S. 166, 176-78 (1974). Closely related to this prudential standard is the general rule barring, outside of a narrowly limited class of cases, suits in which standing is rested on one's status as a federal taxpayer. *Frothingham v. Mellon,* 262 U.S. 447 (1923); *cf. Flast v. Cohen,* 392 U.S. 83, 114 (1968) (Stewart, J. concurring). And even when a litigant has demonstrated a concrete and particularized injury to himself, he is usually permitted to assert only his own legal rights as a ground for decision in his favor, not those of third parties not before the court. *Warth v. Seldin, supra,* 422 U.S. at 499, 514; *United States v. Raines,* 362 U.S. 17 (1960).

Several justifications for these standing rules have been articulated. One is judicial economy. The federal courts have an institutional interest in avoiding the costs of adjudication unless the requested relief is genuinely needed. The requirement that an injury capable of redress be pleaded and proved helps to provide that assurance. *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 221. The further requirement that the plaintiff be himself hurt is additional evidence that the grievance alleged is strongly felt and not merely factitious. On a deeper level, the Court's standing rules recognize a constitutional preference for solving social and political problems by consent. *Warth v. Seldin, supra,* 422 U.S. at 500; *United States v. Richardson, supra,* 418 U.S. at 188-89 (Powell, J., concurring). Standing rules place the burden on the person seeking a non-majoritarian, court-imposed solution to demonstrate the need for judicial intervention.[2] These institutional interests in the avoidance of ephemeral litigation or collision with majoritarian decisions are the primary justification for standing rules.

A secondary justification for those rules is protection of the quality of the court's adjudication of constitutional issues. In theory, at least, both the requirement that the constitutional claim be presented by a party with a genuine stake in the action and the requirement that the complaint come from the mouth of the person who actually suffered the illegal injury assure that the court will obtain from the attorneys in the case a fuller and more accurate account of the considerations relevant to the decision than it would otherwise receive. *Baker v. Carr,* 369 U.S. 186, 204 (1962); *see also, Singleton v. Wulff, supra,* 428 U.S. at 114; *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 221. In view of the relatively minor injuries which have

2. Because standing rules are so closely identified with the principle that unnecessary conflict with the majoritarian branches of government should be avoided, it would seem to follow that when those branches invite individual intervention through an express grant of standing, that grant should be recognized, with little concern for either Art. III or prudential barriers to justiciability. *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. at 224 n.14 (citing cases).

been held to warrant a grant of standing, it may be doubted whether in most cases standing rules provide more than formal assurance of vigor in the litigation. Still, the concern that litigants may, by exaggeration or understatement, distort the interests of those not parties to the suit is a real and a continuing one.

Of course, the court's inquiry into the costs of intervention, including the risk of a mistaken adjudication, is not conducted in a vacuum. A denial of standing, even to a less-than-ideal claimant, may also impose important costs. Thus, while standing should not depend upon the "merits of the plaintiff's contention that particular conduct is illegal," *Warth v. Seldin, supra,* 422 U.S. at 480; *Flast v. Cohen,* 392 U.S. 83, 99 (1968), it often implicates a court's belief that a grant of standing to challenge the asserted illegality is necessary or desirable in order to advance the constitutional or statutory policies at issue in the litigation. The Supreme Court has expressly acknowledged the relevance of substantive policy where the issue is the relaxation or reinforcement of prudential standing limitations. *Warth v. Seldin, supra,* 422 U.S. at 500. In such cases, it has suggested, the question is whether "the constitutional or statutory provision in question implies a right of action in the plaintiff." *Id.* at 501. The same considerations must, we think, be considered in the definition of an Art. III case or controversy. Injury in fact, after all, is not mentioned in Art. III, and case or controversy is surely not a self-defining category. The definitional problem is, of course, minimal when a plaintiff alleges a substantial past physical or financial injury of a traditional sort. But where the injury is less tangible, the determination whether it merits Art. III recognition will necessarily turn on a court's view of the sensitivity of the constitutional values in dispute.

III. Frissell's Standing

We turn then to the allegations made in Frissell's complaint. Since it was dismissed on the pleadings we must,

and do, accept as true all material allegations of the complaint, and construe them in favor of the complaining party. *Warth v. Seldin, supra,* 422 U.S. at 501; *Conley v. Gibson,* 355 U.S. 41 (1957).

Contemplating those allegations, we think that an Article III injury to the Bulletin has been made out. The type of financial injury which resulted from the Mayor's withdrawal of funding is one with which courts have long been familiar. The injunction sought would redress that injury directly and forcefully, and no prudential consideration would bar the Bulletin from asserting its own injury. Moreover we assume, without deciding, that were the Bulletin to press a suit in its own behalf it could readily establish that its First Amendment rights have been violated. The chilling impact of money damages upon legitimate press activity protected by the First Amendment is a constitutional commonplace. *E.g., New York Times v. Sullivan,* 376 U.S. 254, 277 (1964). It is not hard to appreciate that the government's withdrawal of advertising from a newspaper would have a similar effect. Moreover, although the City's advertising program is claimed by the defendants to be within the discretionary authority of the Mayor, it seems to be settled, at least in the First Amendment area, that "the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . .' " *Elrod v. Burns,* 427 U.S. 347, 359 (1976) (plurality opinion), *quoting from Perry v. Sindermann,* 408 U.S. 593, 597 (1972). The Mayor's withdrawal of advertising, if aimed, as alleged, at deterring legitimate press activity, probably would be construed as falling within this proscription. *See also Grosjean v. American Press Co.,* 297 U.S. 233, 250 (1935).

But while the Bulletin is well situated to press this claim, it has not yet seen fit to sue Mayor Rizzo or the City. And although the paper has apparently been aware of the instant lawsuit since it was filed more than six months ago, it has taken no steps to intervene or otherwise assert its

own interests either in the district court or on appeal. Indeed, both Frissell and the defendants are in agreement that the Bulletin has throughout "taken no position" regarding the outcome of his lawsuit. Thus, we must consider whether, in the absence of any action by the Bulletin, Frissell is entitled to seek relief on the Bulletin's behalf. Frissell alleges two theories to support that entitlement: (1) that he is a member of the public with standing to protect "the free flow of information in the Philadelphia community"; (2) that as a taxpayer he has standing under Pennsylvania and federal law to halt the illicit manipulation of government funding for objects violative of the First Amendment. We find both of these theories unpersuasive.

A.

Frissell alleges that he has been injured because the effect of the withdrawal of advertising is "to chill and inhibit freedom of the press and freedom of association" in Philadelphia. He points out that the Supreme Court has recognized that the First Amendment protects "an uninhibited marketplace of ideas in which truth will ultimately prevail." Plaintiff's Brief at 7; *see Elrod v. Burns,* 427 U.S. 347, 357 (1976) (plurality opinion); *Abrams v. United States,* 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). But it does not follow that because the First Amendment protects widespread public debate, every member of the general public suffers injury whenever the First Amendment is violated in a manner that remotely tends to chill that debate. The consequence of such a rule would be to make virtually all First Amendment violations subject to instant legal challenge despite the absence of any concrete impingement upon the personal interests of the challenger. *Schlesinger v. Reservists to Stop the War, supra,* 418 U.S. 223. Such an expansive definition of legally cognizable injury under the First Amendment strays too close to permitting standing to vindicate an abstract in-

terest in the legality of government conduct, and we therefore reject it.

More persuasively, Frissell points to cases recognizing the First Amendment right of "hearers" to challenge restrictions placed upon persons whom they wish to hear. *E.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.,* 425 U.S. 748, 756-57 (1976); *Kleindienst v. Mandel,* 408 U.S. 753, 762-65 (1972); *Lamont v. Postmaster General,* 381 U.S. 301 (1965).[3] In all of these cases, persons whose access to information was barred by restraints upon the speaker were permitted to assert their own "right to hear" as a ground for invalidating those restraints.

We agree with Frissell that the rationale of these cases might, in an appropriate case, support the conclusion that a would-be hearer suffers Art. III injury from a monetary sanction aimed at deterring a speaker from communication protected by the First Amendment. The inhibiting effect of such sanctions is recognized. *New York Times v. Sullivan, supra.* Moreover, the concrete impact of a discrete sanction directed at a specific relationship differs fundamentally from the "subjective 'chill,'" resulting from the "mere existence" of a government program that was held insufficient to establish injury in fact in *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972). On the contrary, that impact would constitute a "specific present objective harm," *id.* at 14, to a relationship protected under the First Amendment. For similar reasons, we doubt that the holding in *Warth v. Seldin,* 422 U.S. 490 (1975), requiring the pleading of "but for" causation, would be applicable to a suit founded on a protected speaker-hearer relationship, even in those cases where plaintiff cannot demonstrate that the speaker has actually been prevented from speaking by the governmental sanction. The sensitive nature of First Amendment rights and the difficulty of ob-

3. *See also, Procunier v. Martinez,* 416 U.S. 396 (1974) (speakers permitted to rely on the rights of hearers); *Martin v. Struthers,* 319 U.S. 141, 143 (1943) (dictum).

taining proof of a causal connection might well render such an inquiry into the speaker's behavior wholly impracticable and undesirable. *Cf. Herbert v. Lando*, 568 F.2d 974, 984 (2d Cir. 1977), *cert. granted*, 98 S. Ct. 1483 (1978). In any event, we think a plaintiff who alleged such a chill would be entitled, before his complaint was dismissed, to discovery for the purpose of determining whether the sanction in fact had an inhibiting impact.[4]

We need not decide this difficult issue, however, since for two reasons appellant's allegations do not bring him within the rationale of the right to hear cases. First, it is apparent that in those cases the hearer asserted an injury to an interest in a defined relationship with a specific speaker or speakers.[5] For example, in *Kleindienst v. Mandel, supra*, the hearers were American professors and

4. *Paton v. LaPrade*, 524 F.2d 862, 873-74 (3d Cir. 1975), would not necessarily be controlling in the face of the allegations we suggest would be needed to support a grant of standing here. In *Paton* this court affirmed a district court's grant of summary judgment, rejecting the standing of a high school teacher who sought damages and injunctive relief against the FBI on account of an investigation by that agency of a student who had, during the course of research for a high school project, addressed a letter of inquiry to an asserted subversive organization. The teacher alleged that the FBI's action had infringed his right of academic freedom.

The *Paton* court rejected this claim as a basis for standing. The allegation, the court found "might be sufficient to confer standing" at the complaint stage. On the facts arrayed in support of the motion for summary judgment, however, the claim failed. These facts showed that the plaintiff did not teach the course at issue and was not responsible for the student's mailing of the letter. These admissions, the court said, made it "difficult to determine how he was directly injured by defendant's activities." Moreover, the teacher conceded that the FBI's activity had had no effect on his educational activities. The only factual injury asserted against the motion for summary judgment was the "inhibiting force" of the FBI's activity. This "subjective chill", the court found, was so much like that described in *Laird v. Tatum, supra*, as to bar standing on that ground as well.

This case is distinguishable from *Paton* in two important respects. First, the case arises on a dismissal of the complaint, rather than a motion for summary judgment. The detailed assessment of the nature of the injury possible on the record in *Paton* therefore is not possible here, and we must construe the complaint in favor of the appellant. Second, in the *Paton* case the record affirmatively disclosed the absence of any relationship between the injured student and the teacher himself. The plaintiff's allegation was based, not on the harm to him flowing from the student's injury, but rather on the speculative possibility of future injury to other students.

5. In the closely analogous situation where a litigant is seeking to assert the constitutional rights of a third party, the Supreme Court has required that such a relationship be demonstrated. *E.g., Singleton v. Wulff, supra*, 428 U.S. at 114-115.

writers who had invited Mandel, a noted Marxist intellectual, to speak in this country. Mandel had been excluded. In *Lamont*, plaintiffs were persons to whom Communist literature had been addressed from overseas. The Court found that the postal regulations in issue impeded their access to those publications. And in *Virginia State Board of Pharmacy, supra*, the hearers were consumers seeking to void Virginia's ban on price advertising for prescription drug advertising. The Supreme Court, sustaining their right to hear, specifically noted that the parties had stipulated that "some pharmacies" would publish advertising in the absence of the prohibition. 425 U.S. at 756 n.14.

The requirement that the hearer demonstrate injury to a relationship with an affected speaker is, we think, essential to avoid the kind of broad scale assertion of injury to an undifferentiated public interest that the appellant's initial theory of standing suggests. Exactly how well defined or intimate that relationship must be the cases do not make clear. The Court's willingness to accept the broad allegations of potential consumers in *Virginia State Board of Pharmacy, supra*, certainly indicates that a person who alleged that he was a regular reader of a newspaper might stand in such a relationship. *See also Lamont v. Postmaster General, supra.* But *Procunier v. Martinez*, 416 U.S. 396 (1974), implies that the right to hear might be limited to persons who have a " particularized interest" in communicating with the speaker or to "particular means of communication in which the interests of both [hearer and speaker] are inextricably meshed." *Id.* at 408-09. Under such a test, the standing of newspaper readers might well be in doubt. We need not fully resolve this issue, however, since the appellant nowhere even alleges that he reads or subscribes to the Bulletin, or that the Bulletin, as distinct from the Philadelphia press generally, has, in fact, been silenced or even inhibited on any subject in which he was interested. In the absence of such allegations, his claim of personal injury is deficient.

Even if we were to read Frissell's complaint as sufficiently alleging injury to a protected relationship with the Bulletin, however, the cases recognizing the right to hear suggest a second and more significant prudential reason why he may not be heard to assert that injury. As a matter of logic, the right to hear and the right to speak are "two sides of the same coin." *Kleindienst v. Mandel, supra,* 408 U.S. at 775 (Marshall, J., dissenting). The two rights are not, however, completely coequal: the right to hear flows from and depends upon the right to speak. Generally there can be no right to hear what a speaker does not choose to say.[6] In most cases, then, the speaker—not the hearer—will be in a better position both to identify and weigh precisely the injuries flowing from First Amendment restraints and to present them for judicial redress. This superior position suggests that the recognition of standing to assert the right to hear is fundamentally analogous to a grant of standing to assert the rights of a third party and ought, perhaps, to be governed by similar prudential restrictions, including the rule that one may claim standing to assert the rights of a third party only upon a showing that some "genuine obstacle" has prevented the third party's vindication of his own legal rights. *Singleton v. Wulff, supra,* 428 U.S. at 116; *NAACP v. Alabama,* 357 U.S. 449 (1958); *Barrows v. Jackson, supra. See also O'Malley v. Brierly,* 477 F.2d 785, 788-89 (3d Cir. 1973). The assumption behind this rule is that, in the absence of a showing that such an obstacle exists, the third party has presumably consented to, or does not view himself as injured by, the challenged state conduct. *Singleton v. Wulff,* 428 U.S. at 116. In such cases, it may well be that the thrust or timing of, or choice of forum for, the action in which the rights of the third party are raised, conflicts importantly with the third party's underlying interest.

6. *Cf., Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974) (reply statute violates freedom of the press); *but cf., Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 389-92 (1969) (upholding FCC's fairness doctrine).

This limitation on third party standing thus enforces a "best plaintiff" rule in order to avoid needless and perhaps counterproductive litigation. *See* 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531 at 211-12 (1975).

The facts of this case illustrate that the risk of conflict of interest may be especially great when a hearer is granted standing to protect the First Amendment interests infringed by retaliation aimed at a speaker—particularly a newspaper speaker. The Bulletin is quite clearly the preferred plaintiff in this lawsuit. If it has suffered a direct and substantial financial injury, as a professional speaker, it has both a powerful incentive to litigate illegal conduct in violation of its First Amendment rights, and considerable expertise in doing so. We must assume, in the absence of any allegation to the contrary, that the Bulletin's decision not to bring suit reflects a considered judgment as to its most advantageous course of action. To name only one possibility, the Bulletin may well have concluded that in the Philadelphia market its loss of City advertising marks it as a "crusading" paper, truly independent of the City's hierarchy, and thus increases its overall credibility and marketability. In contrast, a reader's suit is unlikely to be prosecuted with the full sophistication of a claim presented by the newspaper and often may not reflect the paper's judgment of its most profitable course of action. The risk of conflict between media and audience interest is enhanced by the fact that, as noted above, the newspaper-reader relationship is not so intimate as to provide strong circumstantial guarantees of community of interest. There is perhaps a greater danger that plaintiffs may press such suits for short range personal or political, rather than long-range institutional considerations. On the other hand, if it could be shown that the newspaper itself is somehow disabled or impeded from pressing its own claim, by fear of future reprisal or for other reasons, a court might be hard pressed to deny

the claim of a reader to protect his own interest in the relationship, and indirectly, the newspaper's rights, as well.[7]

There is implicit support for approaching the right to hear as a problem of third party standing in the facts, if not the express reasoning, of the cases where the Supreme Court has recognized such a right. Thus both *Kleindienst v. Mandel, supra,* and *Lamont v. Postmaster General, supra,* the potential speakers were foreign nationals living overseas, who were disabled from protecting the First Amendment interests at stake by broader general rules limiting their right to enter this country or to import materials into it. *See* 408 U.S. at 753; 381 U.S. at 308 (Brennan, J., concurring). In both cases, the only way that the underlying First Amendment interest could be effectively vindicated was by a grant of standing to the would be hearers. While in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* no legal obstacle prevented pharmacists from vindicating their own

7. This case is distinguishable from those where if the party before the court is not allowed to press the third party claim, the rights of third parties will be diluted. *See Carey v. Population Services International,* 431 U.S. 678, 683 (1977); *Craig v. Boren,* 429 U.S. 190, 192-97 (1976); *Eisenstadt v. Baird,* 405 U.S. 438, 443-446 (1972). In these cases, vendors of goods or services were permitted to assert the constitutional rights of potential vendees as a basis for the invalidation of restrictions on the distribution of their product, despite the absence of any indication that the customers were disabled from vindicating their own rights. The rationale for permitting that assertion was that in each instance the enforcement of the sale restriction against the person seeking to assert *jus tertii* would have indirectly burdened the potential purchaser's exercise of his constitutional rights. *See* Note, *Standing to Assert Constitutional Jus Tertii,* 88 Harv. L. Rev. 423, 431-34 (1974). The alleged constitutional deprivation to the Bulletin here is not an indirect consequence of any injury to the plaintiffs, but rather a cause of it. *Id.* at 434.

Moreover, in cases like *Craig* and *Carey,* the existence of the vendor-vendee relationship and the fact that the class of potential third party claimants was large suggested both that the vendor's representation was likely to be vigorous and well financed, *Craig v. Boren, supra,* 429 U.S. at 194, and that if the claim by the vendor were not recognized, a new, repetitious claim by at least one member of the vendee class would follow thereupon. *Id.*; 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531 at 212 & Supp. at 41 (1978). In fact, the co-claimant in *Craig v. Boren,* whose suit was mooted prior to review in the Supreme Court, was a member of the class of vendees. In the situation before us, however, these considerations cut in favor of denying standing. There is here real danger that a newspaper reader will not adequately represent the Bulletin's interest. Moreover, if the plaintiff is not allowed to sue, it is possible that no claim will ever reach federal court, and if such a claim is presented it is likely to differ significantly from that presented by this claimant.

First Amendment rights to advertise, the effect of the Board's restrictions on a price advertising was to create a pharmacists' cartel, sheltered from competition, which sharply reduced the incentive for any individual pharmacist to oppose the regulations. The grant of standing to consumers to challenge the advertising ban was, under the circumstances, an appropriate means to vindicate the First Amendment interests at stake. In sum, it appears to us that the cases where the Supreme Court has permitted a hearer to vindicate First Amendment interests are most appropriately viewed as instances where the "prudential considerations" which often bar the assertion of third party rights were overcome by a demonstrated obstacle to the speaker's vindication of First Amendment values which justified implication of a right of action in favor of the hearer. We therefore conclude that, even if Art. III injury has been shown in this case, since Frissell has suggested no "genuine obstacle" which bars the Bulletin from bringing suit in its own right, his standing to vindicate that right should be denied.

B.

Frissell also argues that he has standing as a municipal taxpayer to challenge the Mayor's action. He points out, correctly, that Pennsylvania has recognized the standing of municipal taxpayers to challenge unlawful expenditure of government funds. *E.g., Price v. Philadelphia Parking Auth.,* 422 Pa. 317, 221 A.2d 138 (1966); *Loewen v. Shapiro,* 389 Pa. 610, 133 A.2d 525 (1957). Since the Mayor's withdrawal of advertising involves a diversion of city funds alleged to violate the First Amendment,[8] he argues, he has standing to halt that withdrawal.

8. It is unclear whether the city's diversion to other, legal uses of funds withheld from the Bulletin is the type of unlawful or potentially unlawful commitment of government resources required to support taxpayer standing under Pennsylvania law, since it would not create a risk of increased city taxes. *Price v. Philadelphia Parking Auth., supra,* and *Loewen v. Shapiro, supra,* both suggest that some risk of increased taxation is required.

Even if Frissell could claim standing under state law, we do not think that would help him in this suit, since it was brought in a federal trial court. There has been considerable dispute whether standing to raise a federal question in *state* court is a matter of federal or state law. See *Flast v. Cohen,* 392 U.S. 83, 132 n.22 (Harlan, J., dissenting) (federal); Freund, in E. Cahn, Supreme Court and Supreme Law 35 (1954); *contra,* G. Gunther, Constitutional Law 1573-74 (9th ed. 1975). On direct review the Supreme Court has on occasion considered, although not without dispute, the merits of cases in which standing was based on state law rules. *Everson v. Bd. of Education,* 330 U.S. 1 (1947); *Bradfield v. Roberts,* 175 U.S. 291 (1899); *cf. Richardson v. Ramirez,* 418 U.S. 24, 36-40 (1974) (mootness). *But see, Doremus v. Bd. of Education,* 342 U.S. 429 (1952); *Tileston v. Ullman,* 318 U.S. 44 (1943). In a federal trial court, however, standing to sue is determined by federal law. *Baker v. Carr, supra,* 369 U.S. at 204.

Petitioner's reliance on *Flast v. Cohen,* 392 U.S. 83 (1968), as the source of a federal law taxpayer cause of action is misplaced. *Flast,* it is true, permits state or municipal taxpayer suits in federal court, *e.g., Public Funds for Public Schools v. Byrne,* No. 78-1218, at 5 n.3 (3d Cir. Jan. 12, 1979), but only to challenge expenditures in violation of those constitutional provisions which are recognized as specific limitations upon state power to tax and spend. Assuming *arguendo* that the plaintiff could show an expenditure—and hence injury—in this case, he has alleged no conduct in violation of a specific constitutional limitation on the spending power. *United States v. Richardson,* 418 U.S. 166 (1974), makes this clear. In *Richardson* the plaintiffs contended that those provisions of the Central Intelligence Act which provided that CIA expenditures were not to be made public violated the constitutional requirement that Congress publish a regular statement and account. Art. I, § 9, cl. 7. A requirement of a regular

statement of expenditures would appear to be a relatively specific limitation upon the government's exercise of the spending power. The Supreme Court, however, held otherwise. 418 U.S. at 175. In the wake of the *Richardson* holding the claim that the general First Amendment guarantees of free press and free speech fall within the class of specific limitations satisfying the *Flast* test is without merit.[9] In the absence of an alternate source of taxpayer standing appellant's claim was properly denied.

IV. Conclusion

Where, as here, a plaintiff seeks relief for the violation of First Amendment rights of a newspaper, and the complaint fails to allege either that the newspaper has actually been inhibited in its reporting of the news, thus injuring its readers' right to hear, or that it is in some manner inhibited from asserting its own First Amendment rights, we hold that the complaint may be dismissed for failure to state a claim upon which relief can be granted. The judgment of the district court will be affirmed.

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9. Moreover, a central, if unarticulated justification for the grant of taxpayer standing in *Flast* was the feared lack of other suitable claimants capable of raising the Establishment Clause claim against expenditures for non-public education. See *United States v. Richardson, supra,* 418 U.S. at 195 n.17 (Powell, J., concurring); 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531 at 195 (1975). That rationale is not available here.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Order of the District Court Dismissing the Complaint

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

LEE FRISSELL,

Plaintiff,

v.

FRANK L. RIZZO,
Mayor of the City of Philadelphia,

and

SHELDON L. ALBERT,
City Solicitor of the City of Philadelphia

and

CITY OF PHILADELPHIA, PENNSYLVANIA,

Defendants.

No. 78-2019
Civil Action
Filed June 22, 1978

AND NOW, this 22nd day of June, 1978, after hearing and upon review of the complaint and after consideration of the briefs and arguments of counsel, it is hereby

ORDERED

that the complaint be DISMISSED for the reason that plaintiff has no standing to bring this action.

BY THE COURT:

JOSEPH L. McGLYNN, JR.,
J.

Entered 6/23/78
(Illegible)

Plaintiff's Motion for Preliminary Injunction

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

LEE FRISSELL,

Plaintiff,

v.

FRANK L. RIZZO, *ET AL.*,

Defendants.

Civil Action

No. 78-2019

Plaintiff hereby moves the Court for grant of a preliminary injunction, restraining defendants from denying newspapers customary public advertising as a reprisal for publication of news articles deemed offensive by defendant Frank L. Rizzo. The facts upon which this motion is based are set forth in the verified complaint and in the attached newspaper article.

/s/ RICHARD A. ASH,
Richard A. Ash,
LYMAN & ASH,
1612 Latimer Street,
Philadelphia, PA 19103,
Attorney for Plaintiff.

The Evening Bulletin

Tuesday June 13 1978 EK

Rizzo Pulls Legal Ads Out of Bulletin

By DAVID RUNKEL
And A.W. GEISELMAN JR.
Of The Bulletin Staff

Mayor Rizzo said today he has instructed city officials to withhold city legal advertisements from the Bulletin "forever," then added: "or as long as I'm mayor."

"You have to hit them in the pocketbook where it hurts," he said at an impromptu news conference.

The move, he said, was the result of a story which appeared in the Sunday Bulletin reporting that negotiations were in progress to offer cancer insurance to city employes. The local representative of the insurance firm, American Family Life Assurance Co. of Columbus, Ga., is Alfred E. Smith O'Neill, who is spearheading a drive to change the City Charter so Mayor Rizzo can seek a third term.

Bulletin officials said this afternoon that city advertising billings with the Bulletin total $280,000 a year, and that sheriff's sales advertising accounts for another $130,000.

City Solicitor Sheldon L. Albert said he "will certainly pass on the Administration's policy to the sheriff and I have no doubt that he will go along with pulling sheriff's sales ads out of the Bulletin."

He pointed out that only ads in which the mayor has the discretion to place ads will be pulled from the Bulletin.

For instance, he said, there is a city

Please Turn to Page 3

Continued From First Page

ordinance which requires that proposed city ordinances be advertised in the three city newspapers of largest circulation, so the mayor could not pull those ads from the Bulletin.

Earlier today, the mayor said he would immediately fire any person in his Administration who negotiated with the cancer-insurance firm represented by third-term charter-supporter O'Neill.

Rizzo said he remains convinced, however, that no such negotiations between his Administration and O'Neill ever took place.

The Bulletin's Sunday story revealed that a top official of American Family Life Assurance Co. had said that negotiations were in progress to offer cancer insurance to city employes.

Policy premiums could be paid through a payroll-deduction plan, according to R. Lee Anderson, company vice president.

Rizzo said he understood that as a result of an investigation by City Solicitor Albert there had been some discussion on selling the cancer insurance to members of the city employes credit union. He pointed out that the credit union is not a city government agency.

"Name the person," Rizzo said at a morning news conference today to a Bulletin reporter. "If anyone in my Administration negotiated with this company, he will be fired before you can say Yankee Doodle Dandy.

"You give me the names and I'll fire them."

Rizzo said the Bulletin story is "helping me change my mind" about running for a third term.

"When I made that statement at Whitman, I was sincere," the mayor said concerning his March speech at Whitman Park during which he announced he would not seek a charter change nor another term as mayor.

Rizzo added:

"In their (the Bulletin's) desire to destroy me, they are making me consider changing my mind. I am vacillating."

Noting that "a lot of people are depending on me," the mayor said the major issues before Philadelphia now are public housing, quota systems (in minority hirings and educational admissions) and the death penalty.

Rizzo indicated he was a strong proponent of the death penalty and an opponent of quota systems and that other potential candidates did not share his views on these issues.

At his press conference, the mayor also accused Bulletin managing editor George Kentera of "arrogance."

"I never spoke with anybody with such arrogance," Rizzo said. "I tried to tell him that was a bad story; that it was not a true story, and I asked him to look into it."

He said Kentera did not respond to his criticism.

"If I had exhibited that arrogance, I would deserve to be voted out of office," Rizzo said. "I understand now why the papers do not have any credibility."

Kentera issued this reply: "In our telephone discussion I treated the mayor with the courtesy and attention to which he is entitled as the elected representative of the people of Philadelphia. I shall continue to do that.

"But the mayor is mistaken when he says I did not respond to his complaint. I told him, and I told his city solicitor, Mr. Albert, that the Bulletin believed the story to be true and responsible. I continue to hold that opinion."

The report in the Sunday Bulletin said O'Neill was laying plans to sell cancer insurance to city employes through a city payroll-deduction plan.

Rizzo refused to answer questions about O'Neill before the story was published.

O'Neill, who has said a sense of civic interest is his only motive for promoting a City Charter change to allow Rizzo to seek a third term, has not responded to the Bulletin story — either before its publication or afterwards.

Anderson told the Bulletin last week that American Family Life was negotiating with the City of Philadelphia to offer the firm's cancer insurance to city employes on a payroll-deduction plan.

Anderson twice reconfirmed his statement in the wake of the Bulletin's Sunday report.

In addition, a Philadelphia insurance executive told the Bulletin O'Neill approached him about three weeks ago and said Rizzo had given the green light to a cancer-insurance offering to city employes. That source also reconfirmed the accuracy of the Sunday Bulletin report after Rizzo's denials.

Deputy City Commissioner Michael McAllister said today O'Neill approached him on Friday with a "proposition" of marketing American Family Life cancer insurance to city employes through the Philadelphia City Employes Federal Credit Union of which McAllister is an officer.

McAllister said O'Neill told him, "We've been to the city Finance Department and they've turned us down."

McAllister said after a review of O'Neill's proposal, the credit union also turned O'Neill down.

The Complaint

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

LEE FRISSELL,

Plaintiff,

v.

JM

FRANK L. RIZZO,
Mayor of the City of Philadelphia,

and

SHELDON L. ALBERT,
City Solicitor of the City of Philadelphia,

and

CITY OF PHILADELPHIA, PENNSYLVANIA,

Defendants.

Civil Action

No. 78-2019

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1. This action arises under the Civil Rights Act, Title 42 U.S.C. § 1983, which provides redress for deprivation of Constitutionally protected rights under color of state law.

2. This Court has jurisdiction under Title 28 U.S.C. § 1343, which provides jurisdiction to district courts to redress deprivation under color of state law of Constitutionally protected rights.

The Complaint.

Identity of the Parties

3. Plaintiff, Lee Frissell, is an individual residing in the City of Philadelphia ("the City"), in the Commonwealth of Pennsylvania. He is a registered voter and taxpayer in the City.

4. Defendant the City is a corporate and political body and a municipal subdivision of the Commonwealth of Pennsylvania. It has about two million residents and is the fourth largest city in the United States.

5. Defendant Frank L. Rizzo is the Mayor of Philadelphia.

6. Defendant Sheldon L. Albert is the City Solicitor of Philadelphia. In that capacity, he serves as chief legal adviser to the City and its various officials.

Background of the Litigation

7. The Evening Bulletin ("the Bulletin") is a newspaper of general circulation published daily in Philadelphia and widely circulated within Philadelphia and its environs. It is one of the two most widely circulated newspapers in Philadelphia.

8. Early in June, 1978, the Bulletin published certain news articles that Mayor Rizzo deemed offensive.

Acts Complained of

9. In direct reprisal for the Bulletin's publication of these articles, Mayor Rizzo promulgated a policy whereby the Bulletin is to be deprived of certain public advertisements that are customarily run in this newspaper and paid for out of the public funds. The value of such advertising totals about $280,000.00 on an annual basis.

10. Mayor Rizzo called a public press conference to announce his policy and its purpose of hurting the Bulletin in its pocketbook. He also said that he would recommend that the Sheriff of Philadelphia County carry out a similar policy with respect to public advertising under his control.

11. Defendant Albert aided and abetted the Mayor in the formulation and implementation of these policies. He has further stated that he will recommend that the Sheriff of Philadelphia County, to whom he is a legal adviser, carry out similar policies.

12. The effect of defendants' activities is to chill and inhibit freedom of the press and freedom of expression in the City, to the detriment of plaintiff and other citizens.

WHEREFORE, on the basis of the foregoing, it is requested that the Court enter judgment granting the following relief:

(a). Preliminarily and permanently enjoining defendants from denying newspapers customary public advertising as a reprisal for publication of news articles deemed offensive by the Mayor; and from taking other reprisals against the press, in their official capacities;

(b). Granting such other and further relief as is warranted by the circumstances;

(c). Awarding costs of suit and reasonable attorney's fees.

/s/ RICHARD A. ASH,
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Attorney for Plaintiff.